FILE COPY

Office Supreme Court, U.
FILED
FEB 11 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 540.

THEODORE STITT,

Petitioner,

against

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION, RESPONDENT.

INDEX.

SUBJECT INDEX.

	PAGE
INTRODUCTORY	1
OPINIONS BELOW	2
JURISDICTION	3
STATEMENT OF THE CASE	3
QUESTIONS PRESENTED	5
SUMMARY OF ARGUMENT	5
ARGUMENT:	
POINT I.—The lower court rightly held that no commissions (beyond statutory fees) were payable to the referee in bankruptcy under Section 40 of the Bankruptcy Act, since in the bankruptcy proceeding no moneys had been disbursed to creditors and no composition had been confirmed	7
A. Neither a superseding proceeding for reorganization under Section 77B of the Bankruptcy Act nor the subsequent confirmation of a reorganization plan in such proceeding constitute a confirmation of a compostion within the meaning of Section 40 in fixing compensation in a prior bankruptcy proceeding.	9

PAGE

B. Section 40 (c) of the Bankruptcy Act authorizes the judge merely to determine what part of the fee and commissions payable under Section 40 (a) shall be paid to a referee whose reference is revoked, and gives no power to allow compensation where no compensation is payable under Section 40 (a) 11

C. The fact that some services have been performed furnishes no basis for compensation unless the conditions of Section 40 exist; supposed hardship is disregarded 14

D. Nothing in Section 77B (i) affects the applicability or the construction of Section 40 set forth above 16

POINT II.—If Section 40 should be held inapplicable, the allowance of $25,000 to the referee by the District Court was unreasonable, excessive and exorbitant and this Court, it is submitted, should either fix the reasonable compensation of petitioner or remand the question to the Circuit Court of Appeals laying down standards for its guidance 17

CONCLUSION 20

APPENDIX: Statutory Provisions 21

Table of Cases Cited.

	PAGE
American Surety Company v. Freed, 224 Fed. 333	14
Campbell v. Alleghany Corp., 75 F. (2d) 947	10
In re Central Funding Corporation, 75 F. (2d) 256	10
Continental Illinois National Bank v. Chicago, Rock Island & Pacific Ry. Co., et al., 294 U. S. 648	10
In re Curtis, 100 Fed. 784	15
In re Detroit Mortgage Corporation, 72 F. (2d) 889, certiorari denied 273 U. S. 713	13, 14
In re Le Bolt & Co., referee's report quoted in petitioner's brief, pp. 13-15	13
In re Morris Bros., 8 F. (2d) 629	15
In re O'Gara Coal Co., 260 Fed. 742	10
Realty Associates Securities Corp. v. O'Connor, 295 U. S. 295	7-8, 11, 13, 17

Statutes Cited.

(* Indicates full text in Appendix beginning at p. 21.)

Bankruptcy Act:	
Section 12*	6, 9, 10, 21-22
Section 14 (c)	10
Section 33*	7, 22
Section 36	7
Section 40*	4-9, 12, 13-19, 22
Section 40 (a)*	5, 6, 8-12, 15, 22
Section 40 (b)*	12, 22
Section 40 (c)*	5, 6, 12, 13, 22
Section 48	6, 15, 17
Section 72*	17, 22-23
Section 74	11
Section 77	10
Section 77B	4-6, 9, 10-16
Section 77B (c) (11)*	12, 23
Section 77B (i)*	6, 7, 12, 15, 16, 23-24
Section 77B (k)*	24-25
Act of Congress of June 7, 1934, Section 3; 11 U. S. C. A. Section 76 (a)*	23
Judicial Code, Section 240 (a), as amended by Act of February 13, 1925 (28 U. S. C. 347)	3
General Order in Bankruptcy XLVIII, 288 U. S. 636	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 540.

THEODORE STITT,
Petitioner,

against

RECONSTRUCTION FINANCE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Introductory.

This case relates to the compensation of a referee in bankruptcy (the petitioner) for acting as referee in a bankruptcy proceeding which was terminated and superseded by a reorganization proceeding under Section 77B of the Bankruptcy Act.*

The District Court for the Eastern District of New York entered two orders (R. 219, 220-221), one allowing the petitioner, an official referee in bankruptcy, as referee in the

* A companion case, *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, involves the compensation of the trustees in bankruptcy for their services in the same bankruptcy proceeding.

bankruptcy proceeding, the amount of $25,000 for acting in that proceeding during a ten-month period, and the other directing the trustees in the reorganization proceeding to pay him that amount. An application in both proceedings by respondent Reconstruction Finance Corporation to vacate and set aside the orders and to revise the allowance to the petitioner (as well as certain other allowances) was denied by the District Court in a third order (R. 270-271).

On appeal by the respondent from all three orders, the Circuit Court of Appeals reversed the District Court, holding that the award of $25,000 to the Referee was "clearly erroneous". That portion of the opinion of the Circuit Court relating directly to the Referee's compensation is as follows (R. 294):

> "The award of $25,000 to the referee was clearly erroneous. We have already shown that the reorganization court was without power to increase allowances fixed by the prior court and that the prior court was limited by the provisions of the Bankruptcy Act. Under Section 40 (a) of that act referees are only entitled to 'a fee of fifteen dollars * * * in each case * * * * and twenty five cents for every proof of claim filed for allowance * * * and from estates which have been administered before them one per centum commission on all moneys disbursed to creditors by the trustee * * *'. Under Section 40 (a) the referee here was limited to a fee of $15 and his filing fees and under Section 72 could not 'in any form or guise * * * receive any other or further compensation'."

The referee's filing fee and commissions on claims filed amount together in this case to $1,038.

The referee's petition for rehearing (R. 296-305) in the Circuit Court of Appeals was denied (R. 306). This Court on December 9, 1935, granted a writ of certiorari.

Opinions Below.

The opinions of the District Court are not reported but are printed in the Record (R. 216-217, 263-269). The opinion

of the Circuit Court of Appeals is reported in 79 F. (2d) 187 and appears at R. 287-295.

Jurisdiction.

The opinion of the Circuit Court of Appeals was rendered on July 22, 1935, the order for the mandate thereon was entered on July 29, 1935, and the mandate was filed on September 18, 1935.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended (U. S. C. Title 28, Sec. 347a).

Statement of the Case.

On August 8, 1933, Allied Owners Corporation was adjudicated a bankrupt and referred to the petitioner herein as referee in bankruptcy (R. 102, 188). On June 22, 1934, the bankruptcy proceeding was superseded by a proceeding for reorganization under Section 77B of the Bankruptcy Act (R. 188).

The services of the petitioner as referee in bankruptcy involved in this case were, therefore, performed in the period from August 8, 1933, to June 22, 1934, and are set forth in his petition for allowance (R. 188-203). An examination of the transcript from the referee's "Docket Book" (R. 192-203) shows that few hearings were held and few controverted motions were considered.

On July 27, 1934, the District Court entered an order in the reorganization proceeding, referring certain matters to the petitioner herein as a special master and certain other matters to another as special master (R. 189). The consideration of the reorganization plan which was later proposed in the reorganization proceeding was referred to the other special master and not to the petitioner.

More than seven months after the bankruptcy proceeding was superseded, applications for allowances for services in that proceeding were filed by the trustees in bankruptcy, their counsel, the attorney for the bankrupt and others and on February 4, 1935, the petitioner as referee in bankruptcy gave

notice of a hearing in the bankruptcy proceeding to consider such applications, as well as his own application for $25,000 (R. 187-188).

On March 5, 1935, the referee filed his report in the bankruptcy proceeding (R. 203-216) recommending allowances aggregating $147,000 for the applicants other than himself (the amounts so recommended being subsequently reduced by the Circuit Court of Appeals to an aggregate of $69,628.50) and transmitted "without comment and without recommendation" (R. 204) his own petition applying for $25,000.

On March 11, 1935, Judge Inch entered an order (R. 219) allowing the petitioner $25,000 for his ten months' services as referee in bankruptcy and another order in the reorganization proceeding (R. 220-221) directing the payment of that allowance.

On March 20, 1935, on the petition of the respondent (R. 225-233), Judge Inch signed an order (R. 222-224) directing the petitioner (and others to whose allowances objections were taken) to show cause why the orders of March 11, 1935 should not be vacated and set aside and the allowances reduced to legal and reasonable amounts. After a hearing, Judge Inch filed an opinion (R. 263-269) deciding against the respondent. On May 13, 1935, he entered an order (R. 270-271) denying its motion.

On appeal of the respondent from the orders of March 11, 1935 and the order of May 13, 1935, the Circuit Court of Appeals held, in an opinion (R. 287-295) by Judge Augustus N. Hand, that Section 40 of the Bankruptcy Act is applicable to and fixes the measure of compensation of a referee in bankruptcy for services in a bankruptcy proceeding, that a supervening proceeding under Section 77B does not remove such limitations, and that under Section 40, no cash having been disbursed to creditors, the referee was limited to his filing fee and commission on claims filed, together amounting to $1,038.

It was not until June 13, 1935, almost a full year after the proceeding under Section 77B had been begun and three months after the referee's petition for allowances had been filed, that a plan of reorganization of Allied Owners Corpora-

tion was confirmed in the Section 77B proceeding. That plan has not yet been consummated.

Questions Presented.

Whether a proceeding in reorganization instituted under Section 77B of the Bankruptcy Act which supersedes a prior bankruptcy proceeding, or a plan of reorganization confirmed in the Section 77B proceeding, constitutes a "composition" in the prior bankruptcy proceeding within the meaning of Section 40 (a) relating to compensation of referees in bankruptcy for bankruptcy services.

Whether, when a bankruptcy proceeding is superseded by a reorganization proceeding under Section 77B, the referee in the bankruptcy proceeding, although not entitled under Section 40 (a) to any allowance except statutory fees, is nevertheless entitled to additional compensation by virtue of Section 40 (c) of the Bankruptcy Act which provides that, when a reference is revoked before its conclusion, the judge shall determine what "part of the fee and commissions" shall be paid to the referee.

Summary of Argument.

The referee in bankruptcy is a public officer and his compensation is fixed by statute. Section 40 of the Bankruptcy Act fixes the compensation of referees for bankruptcy services. Under Section 40 (a) of the Bankruptcy Act, the lower court allowed the referee $1,038, being the fee of $15 plus twenty-five cents for each claim filed in the bankruptcy proceeding. As no moneys were disbursed to creditors during the bankruptcy proceeding and no composition was ever proposed, much less confirmed, in that proceeding, the lower court properly allowed no further compensation under Section 40 (a).

In view of the concession by the referee that Section 40 is applicable to his compensation for services in the bankruptcy proceeding, it is unnecessary in this case to deal with

the principal contention raised by the petitioners in the companion case of *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, argued herewith. In that case the petitioners contend that Section 77B (i) removes limitations placed by Section 48 upon compensation allowed in a prior bankruptcy proceeding to trustees in bankruptcy. The referee in this case does not raise the analogous contention that Section 77B (i) removes the limitations of Section 40. On this point, therefore, we respectfully refer the Court to Point I of our brief in the *Callaghan* case.

The referee contends that the institution of the reorganization proceeding under Section 77B, or possibly the confirmation of a plan of reorganization* in that proceeding, is a composition in a bankruptcy proceeding within the meaning of Section 40 (a).

The bankruptcy proceeding and the proceeding under Section 77B are entirely independent and separate proceedings. Each has its own provisions for the compensation of its own officers. The word "composition", as used in Section 40 (a), refers to a composition provided for by Section 12 of the Bankruptcy Act, which of course must take place in a bankruptcy proceeding.

The contention of the petitioner that Section 40 (c) entitles him to a portion of a fee and commissions has no merit. The "fee and commissions" referred to in Section 40 (c) are obviously those referred to in subdivision (a) of the same Section. The revoking of a reference does not entitle a referee to a fee and commissions unless a fee and commissions are eventually payable in the same bankruptcy proceeding under the provisions of Section 40 (a).

Moreover, it does not appear that the reference to the petitioner has been revoked. More than seven months after the proceeding under Section 77B was commenced, he acted as

---

* The plan of reorganization in the proceeding under Section 77B was not confirmed until almost twelve months after the bankruptcy proceeding was superseded and three months after the referee's petition for allowance in the bankruptcy proceeding was filed.

referee in the prior bankruptcy proceeding on the question of allowances to the trustees in bankruptcy and others for services in that proceeding.

If by any chance this Court should hold that Section 77B (i) removes the limitations imposed by statute on the compensation fixed by a court in a prior proceeding for its own officers, it is submitted that the amount of $25,000 as compensation to the petitioner for his services is grossly excessive and exorbitant and that this Court should either determine itself what would constitute a reasonable amount or remand the matter to the Circuit Court of Appeals for its determination in accordance with standards prescribed by this Court.

ARGUMENT.

POINT I.

The lower court rightly held that no commissions (beyond statutory fees) were payable to the referee in bankruptcy under Section 40 of the Bankruptcy Act, since in the bankruptcy proceeding no moneys had been disbursed to creditors and no composition had been confirmed.

The referee in bankruptcy is a public officer and his compensation is fixed and limited by statute.

In *Realty Associates Securities Corporation* v. *O'Connor*, 295 U. S. 295, at page 299, this Court stated:

> "Referees in bankruptcy are public officers (11 U. S. C., §§ 61, 64), and officers of a court. Like public officers generally, they must show clear warrant of law before compensation will be owing to them for the performance of their public duties. * * * Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils. * * * In response to those complaints, Congress has attempted in

the enactment of the present statute to fix a limit for expenses growing out of the services of referees and receivers. Bankruptcy Act, §§ 40, 48 (d), (e), as amended, 11 U. S. C., §§ 68, 76. The pay for referees is no longer involved in uncertainty as to the applicable percentage."

Section 40 of the Bankruptcy Act fixes the compensation allowable to referees and gives the court no discretion. Section 40 (a) reads as follows:

> "Referees shall receive as full compensation for their services * * * a fee of fifteen dollars * * * in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."*

The Bankruptcy Act contemplates that referees shall serve in many cases. Referees may often have to handle estates with little or no assets, and the language quoted from Section 40 contemplates that the fees for proofs of claim are to be "paid from the estate, if any". On the other hand, in cases where large amounts of cash are disbursed to creditors, the referee may receive compensation far beyond any actual value of his services. The bankruptcy court has no power whatsoever to restrict the amount of that large commission, if it falls within the provisions of Section 40 (a).

Similarly the bankruptcy court cannot allow compensation except as provided by Section 40 (a). That Section provides for the payment of commissions (as distinguished from fees which were allowed by the court below) only "from estates which have been administered" before the referee, and only (1) on moneys disbursed to creditors or (2)

---

* For the full text of Section 40 (a), see Appendix, page 22, *infra*.

on the amount to be paid to creditors upon the confirmation of a composition.

In the instant case, the bankrupt estate was not completely administered before the referee. No moneys whatsoever were disbursed to creditors. No composition was confirmed in the bankruptcy proceeding. It is submitted that the Circuit Court of Appeals in denying to the referee any compensation beyond his statutory fees of $1,038 only applied the plain language of Section 40 (a).

A.

Neither a superseding proceeding for reorganization under Section 77B of the Bankruptcy Act nor the subsequent confirmation of a reorganization plan in such proceeding constitute a confirmation of a composition within the meaning of Section 40 in fixing compensation in a prior bankruptcy proceeding.

The referee apparently admits that Section 40 (a) is applicable to his compensation in this case (Br. pp. 7-9). He is suggesting, however, that he is entitled to commissions on the ground that there has been a confirmation of a composition within the meaning of that Section (Br. pp. 8-9). His contention apparently is that either the reorganization proceeding, or perhaps the reorganization plan (not confirmed in this case until three months after his petition for allowance had been filed), amounted to a composition.

But it is clear that the "composition" referred to in Section 40 (a) does not include either a superseding proceeding under Section 77B or a reorganization plan subsequently confirmed in such 77B proceeding. Section 12* of the Bankruptcy Act (which, like Section 40, has been part of the statute for many years) deals at length with compositions in bankruptcy proceedings and with the method of confirming such compositions. The words "the confirmation of a composition," in Section 40 (a) unquestionably refer to a composition and a confirmation thereof provided for by Section 12 and clearly

* For the text of Section 12, see Appendix, pages 21-22, *infra*.

have no application to something done in an entirely independent proceeding.

In support of his contention that the term "composition" in Section 40 (a) may include an independent reorganization proceeding under Section 77B or a plan confirmed in such a proceeding, the referee cites only four cases, none of which is in point. Thus, three of the cases cited by him (*Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648; *In re Central Funding Corp.*, 75 F. (2d) 256; *Campbell* v. *Alleghany Corporation*, 75 F. (2d) 947), are referred to only for their discussion of the constitutionality of Sections 77 or 77B. Their constitutionality was under attack on the ground that those Sections, which require no adjudication of bankruptcy, were not a proper exercise of the Congressional power to make laws on the subject of bankruptcies. In each the court merely said that the same objection could be made to the power of Congress with respect to compositions—a power the existence of which was no longer in doubt. In none of those cases was the construction of Section 40 (a), or the precise meaning of the term "composition" as used in the Bankruptcy Act, involved in any way.

The only other case cited by the referee on this point is *In re O'Gara Coal Company*, 260 Fed. 742 (7th Circuit, 1919). There the court held that a so-called plan of reorganization which had been approved by a majority of the creditors, by the bankrupt and by the court in a bankruptcy proceeding was a composition, confirmation of which would discharge the bankrupt under the provisions of Section 14 (c) of the Bankruptcy Act, and that the order confirming the composition was, therefore, reviewable by appeal. It is to be noted that if the plan had not been a composition within the meaning of Section 12 the court would have had no power whatsoever to put it into effect. The case does not even tend to show that reorganizations effected otherwise than by means of a composition under Section 12 are compositions within the meaning of Section 40 (a). It did not involve

a reorganization plan confirmed in an entirely separate proceeding, for the reorganization plan in question had been approved in the bankruptcy proceeding.

As in *Realty Associates Securities Corporation* v. *O'Connor, supra,* the referee here also "invokes the analogy of General Order XLVIII (4), adopted April 24, 1933 (288 U. S. 636, 637) which fixes the compensation of referees in proceedings under § 74 of the Bankruptcy Act." He states that that Order provides the same commissions for a referee acting in proceedings for the relief of a debtor under that section that are applicable in ordinary bankruptcy proceedings in the case of a composition (Br. p. 9).

Section 74 specifically provides for referees but provides no measure of compensation. This Court, in the exercise of its rule-making power provided that for the purpose of computing commissions of referees acting under Section 74, the term "composition", as used in Section 40 should include an extension proposal, etc. The argument that it had by adopting the General Order construed the language of Section 40 (a) as applied to ordinary bankruptcy proceedings, was definitely rejected by this Court. *Realty Associates Securities Corporation* v. *O'Connor, supra,* pp. 300-301. The further statement by this Court in that case (p. 301) that an ordinary bankruptcy proceeding and a proceeding under Section 74 of the Bankruptcy Act relating to relief of debtors are "of a different class" is clearly applicable to the difference between ordinary bankruptcy proceedings and proceedings under Section 77B.

B.

Section 40 (c) of the Bankruptcy Act authorizes the judge merely to determine what part of the fee and commissions payable under Section 40 (a) shall be paid to a referee whose reference is revoked and gives no power to allow compensation where no compensation is payable under Section 40 (a).

The referee, after arguing that Section 40 (a) is applicable and that the reorganization plan (or possibly the reorganiza-

tion proceeding) constitutes a composition within the meaning of that Section, attempts to rely also upon the provisions of Section 40 (c) (Br. pp. 8-11). Section 40 (c) merely provides that when a reference is revoked before it is concluded, "the judge shall determine what part of *the fee and commissions* shall be paid to the referee."* The revoking of a reference obviously cannot entitle the referee to a part of "the fee and commissions", unless eventually payable in the same bankruptcy proceeding under the provisions of Section 40 (a).

Reading Section 40 as a whole, it is clear that Section 40 (a) was intended to provide the measure of compensation and to establish the conditions under which it is payable. Sections 40 (b) and 40 (c) merely provide a means of allocating the compensation payable under Section 40 (a) when the conditions for its payment have been fulfilled, but when the particular referee has not earned it entirely. Here the conditions of payment of commissions set forth in Section 40 (a) have not been fulfilled and there is no compensation to allocate, except the $1,038 in fees allowed in full to the referee.

Certainly the words "the fee and commissions" cannot refer to any fee or commission allowed in an entirely separate proceeding over which the "judge" who, by the terms of Section 40 (c), is to "determine what part the referee shall receive", has no control. The bankruptcy proceeding and the proceeding under Section 77B are entirely independent and separate proceedings. Each has its own provisions for the compensation of its own officers. Section 40 admittedly applies to referees in bankruptcy proceedings and Section 77B, which does not provide for referees, has in subdivision (c), clause (11),* an express provision for compensation of special masters. Thus Section 40 provides for compensation for referees in bankruptcy computed, not on a *quantum meruit* basis, but by the application of a mathematical formula, whereas Section 77B (c) provides for "reasonable" compensation for

---

* For the full text of Section 40 (c), see Appendix, page 22, *infra*.

the special masters who may be appointed in reorganization proceedings. That the two proceedings are independent and separate is recognized by many provisions in Section 77B, including particularly the provisions of subdivision (i),* which refers to "allowances in the prior proceeding as may be fixed by the court" in that proceeding.

Moreover, it seems impossible that Section 40 (c), dealing with revocation of a reference, could in any event have any application in this case. Technically, of course, there has been no revocation of the reference here†; the order of adjudication in bankruptcy which includes the reference was not revoked by the institution of the 77B proceeding; as is evidenced by the fact that here the referee acted in the bankruptcy proceeding on the question of allowances seven months after the institution of the 77B proceeding. More important than such a technical consideration, however, is the fact that even if the reference is to be considered as no longer in effect, that result follows not from its revocation but from the termination of the bankruptcy proceeding. Section 40 (c) clearly was not intended to deal with the event of termination of the proceeding. Termination of bankruptcy proceedings in other ways has not been thought to entitle a referee to commissions. See, for example,

In re Detroit Mortgage Corporation, 12 F. (2d) 889; certiorari denied 273 U. S. 713.

---

* For the full text of Section 77B, subdivision (i), see Appendix, page 23, *infra*.

† On the question of revocation, the referee places some reliance on the report of another referee in *In re Le Bolt & Co., Debtor* (printed in the petitioner's brief pp. 13-15) in which a referee apparently passed on his own application for fees both in a bankruptcy proceeding and a superseding reorganization proceeding. There the same referee acted throughout both proceedings, as referee in the former and special master in the latter, and, measuring his compensation under Section 40 (a), divided it between the two proceedings. There is nothing to show either that any objections were raised or that the entire amount awarded was not reasonable compensation for services in the reorganization proceeding alone. There also a referee "invoked the analogy" of General Order XLVIII (4) which is applicable to proceedings under Section 74, an analogy which this Court rejected in a similar situation. *Realty Associates Securities Corporation* v. *O'Connor*, *supra*, at pages 300-301. See this brief, page 11, *supra*.

C.

The fact that some services have been performed furnishes no basis for compensation unless the conditions of Section 40 exist; supposed hardship is disregarded.

With regard to the statement of the referee that "commissions were actually earned"* (Br. p. 11), it is obvious that under Section 40 commissions are payable whether or not "earned" and depend merely upon the fact of reference and the making of payments to creditors. The referee points out that referees' compensation is not on a basis of *quantum meruit* (Br. p. 11). Indeed it would be almost as difficult to value the services of a referee on that basis as to value the services of a judge. Unlike a trustee in bankruptcy, the referee does not have to use initiative or assume responsibility in the administering of an estate, other than, for the most part, to pass on those matters which are brought before him.

Referees in bankruptcy handle cases of all kinds. In cases of small estates or estates where little cash is disbursed to creditors and there is no composition, referees may receive little, if any, compensation. On the other hand, where large amounts of cash are disbursed to creditors, the referee may receive compensation far beyond any actual value of his services.

All references which are terminated do not create fees for referees, no matter how much work they may have done. For example, a petition in bankruptcy may be dismissed after reference and in that case no compensation can be paid unless moneys had been disbursed to the creditors by the trustee.

See

In re Detroit Mortgage Corporation, 12 F. (2d) 889; certiorari denied, 273 U. S. 713.

See also *American Surety Company* v. *Freed*, 224 Fed. 333.

---

* As pointed out in the statement of the case, the referee has been allowed $1038 as compensation under Section 40 (a), under the decision of the court below.

In re Morris Bros., 8 F. (2d) 629, in which the Court stated at page 630:

> "Unless, therefore, the law authorizes the payment of commission on property turned over by the referee to the claimants, such compensation cannot be allowed, however meritorious. It seems to me that the statute is plain and unambiguous. The commissions of the referee are to be computed on '*moneys* disbursed to creditors,' and that of the trustee 'on *moneys* disbursed or turned over to any persons including the lienholders.' In each case, it is the moneys disbursed or turned over, and not property, that forms the basis for such allowance. It may be that this will work a hardship in some cases, and perhaps in the instant case; but that affords no reason why the law as written should not be observed." (Italics are the Court's.)

See also *In re Curtis*, 100 Fed. 784, where the Court said at page 792:

> "*The present act*, so far as it specifies the amount of fees of officers whose services may be required in execution of the law, *fixes them at a low figure, possibly much lower than is compensation for the service; but it is not for us, for that reason, to disregard the law, or seek to thwart the design of congress, however inadequate we may think the compensation allowed.*" (Italics ours.)

The rule established by the court below would permit a referee to receive commissions for services in a superseded bankruptcy proceeding if dividends had been paid to creditors. In other words, that court applied Section 40 (a).

The statement by the referee that a bankrupt creditor or stockholder could under this ruling "deprive a referee, who has not been satisfactory to them, of fair compensation by the device of filing a petition under Section 77B" hardly needs answering. It is inconceivable that the decision as to whether a corporation can be reorganized and whether Section 77B proceedings are desirable would be made to depend on whether a referee in bankruptcy had been "satisfactory".

D.

Nothing in Section 77B (i) affects the applicability or the construction of Section 40 set forth above.

Even though the referee concedes that Section 40 is applicable to his compensation for bankruptcy services, he also quotes Section 77B (i) (Br. pp. 7-8) and states that "To deny the referee part commissions for services * * * would seem to make a nullity of this section." It is difficult to understand the effect which he attempts to attribute to Section 77B (i), which expressly provides that the court in the prior proceeding is to fix allowances for its officers. After stating that Congress intended to make "both equitable and reasonable provision for services rendered prior to the 77B proceeding", he goes on to say that under that Section "the allowance certainly should not be greater than an apportioned part of that *authorized* under Section 40." (Italics ours.)

Nothing in subdivision (i) of Section 77B refers in terms to Section 40 of the Bankruptcy Act or suggests the removal of any restriction imposed by that section upon the prior court in determining allowances or suggests any change in the construction by that court of the provisions of that Section.

That Section 77B (i) does not in any manner amend, modify or repeal, either directly or by implication, the specific provisions of Section 48 has been fully covered in Point I, pages 15-19, of our brief in *Callaghan* v. *Reconstruction Finance Corporation*, argued herewith, and we respectfully refer to that brief as an answer to any contention that the referee may have intended in his brief with respect to any claimed effect of Section 77B (i) on Section 40.

It is submitted that the petitioner, a public officer, has not shown "clear warrant of law" entitling him to the compensation allowed by the District Court. Compensation must be based upon the Bankruptcy Act, and under that Act the Court shall not allow a referee "any other or further com-

pensation for his services than that expressly authorized and prescribed in this act."

Bankruptcy Act §72; U. S. Code, Title 11, § 112.
Realty Associates Securities Corporation v. *O'Connor*, *supra*, at p. 299.

POINT II.

If Section 40 should be held inapplicable, the allowance of $25,000 to the referee by the District Court was unreasonable, excessive and exorbitant, and this Court, it is submitted, should either fix the reasonable compensation of petitioner or remand the question to the Circuit Court of Appeals laying down standards for its guidance.

Though the referee admits that Section 40 applies to his compensation, a contrary contention is being made in the analogous situation* involving the compensation of trustees in bankruptcy that the limitations imposed by Section 48 of the Bankruptcy Act are not applicable. We submit that the court below and the petitioner and respondent in this case are correct in their position that Section 40 is applicable. If this Court should, however, hold that Section 40 is inapplicable and that the referee's compensation is to be fixed otherwise than as prescribed by that section, it may properly and should, we submit, determine the amount constituting reasonable compensation for the petitioner's services in the bankruptcy proceeding or remand the matter to the Circuit Court of Appeals for determination, laying down such rules or standards as may be necessary. In this connection, it must be determined whether the amount of $1,038 already

* *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, argued herewith.

allowed as filing fee and commissions under Section 40 is reasonable compensation.*

As pointed out above, it would be almost as difficult to value the services of a referee on a *quantum meruit* basis as to value the services of a judge. His acts are for the most part judicial in character. It is true that he has certain supervisory administrative functions, such as the countersigning of checks. He is not required to exercise initiative in administration.

It is undoubtedly for this reason that Congress in Section 40 *fixed* the measure of the referee's compensation for ordinary bankruptcy proceedings and did not, as in the case of trustees, provide merely a *maximum* within which reasonable compensation was to be allowed.

The transcript from the referee's docket book (R. 192-203) indicates that the following were his principal services:

> Hearing on and disapproval of Mr. Greve's election as trustee and allowance of petition for review (R. 192, 193). (On review the District Court reversed the referee's order (R. 193).)
>
> Signing uncontested or *ex parte* orders which permitted the trustees to retain a management corporation previously engaged by the bankrupt to manage an office building (R. 193); authorized the trustees to continue business (three orders) (R. 193, 195, 200); fixed the time for tax authorities to file claims (R. 195); permitted an advance to a corporation operating a theatre owned by the bankrupt under contract (R. 197-198); and permitted payment of taxes on three parcels of real estate (two orders) (R. 199, 200).
>
> Hearing and determination of the following controverted matters: Removal proceedings against Mr. Greve (R. 194); restraining paying agent from paying interest

* Obviously if Section 40 does not apply the automatic payment of filing fee and commissions cannot be made under that Section; the referee's compensation must be determined as a whole, and it will be necessary to determine whether the $1,038 was adequate and reasonable for the services performed.

(R. 196, 197); segregation of rents by Realty Associates, Inc., (R. 196, 197); modification of stay against foreclosure by trustee under a mortgage of the bankrupt (R. 198).

Presiding over examinations under Section 21 (a) (the minutes covering 1280 pages).

Denial of trustee's petition to invest cash and securities (R. 195).

Mailing of notices (R. 192, 196, 198).

The items mentioned are those which occurred prior to June 22, 1934, the date on which the bankruptcy proceeding *was superseded.* The docket entries in the record, however, include entries to and including November 3, 1934. Such later entries clearly cannot be taken into account.

The referee's own summary of his services (R. 190) is as follows:

> "Meetings, hearings and examinations were held before me on forty-eight occasions, seventeen orders were signed, five reports were filed by the Trustees, six decisions in writing and Certificates were made by me. The business of the bankrupt has been conducted by the Trustees under orders made by me. All checks have been countersigned by me. The number of claims filed is 4,092."

To state that such services are worth $25,000 is to state an absurdity. An examination of the transcript of the referee's docket entries (R. 192-203) discloses the exceedingly small amount of time which the referee actually must have spent on the matter during the ten months' period. A referee in bankruptcy is a public officer and if it should be held that Section 40 is inapplicable to his compensation in the instant case, the determination of his compensation should bear some reasonable relation to the character, scope and importance of his services and the amount of time involved.

The strong congressional intent and public policy against allowing excessive costs of administration is directly applicable in determining compensation in this case. For a fuller discussion on this point we respectfully refer this Court to

pages 29-32 in our brief in the companion case of *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, argued herewith.

CONCLUSION.

It is respectfully submitted that the construction of Section 40 and Section 77B by the Circuit Court of Appeals was correct and its order should be affirmed. If, by any chance, this Court should otherwise construe the effect of Section 77B, it is submitted that this Court should either determine itself what would be reasonable compensation for the referee for his bankruptcy services or should remand the question to the Circuit Court of Appeals laying down such rules as it may deem necessary for the guidance of that court, for on any basis of *quantum meruit* the allowance of $25,000 to the referee for his services was so excessive as to be a grave abuse of discretion.

Dated, February 1, 1936.

Respectfully submitted,

STANLEY REED,
Solicitor General

JAMES B. ALLEY,
General Counsel, Reconstruction Finance Corporation

MAX O'RELL TRUITT,
Solicitor, Reconstruction Finance Corporation

ELI WHITNEY DEBEVOISE,
FRANCIS T. P. PLIMPTON,
Special Counsel, Reconstruction Finance Corporation

HANS A. KLAGSBRUNN,
WILLIAM RADNER,
Attorneys, Reconstruction Finance Corporation

Counsel for Respondent.

APPENDIX.

Statutory Provisions.

BANKRUPTCY ACT (U. S. Code, Title 11).

"Sec. 12. **Compositions, when confirmed.**—(a) A bankrupt may offer, either before or after adjudication, terms of composition to his creditors, after, but not before, he has been examined in open court, or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of the estate, at which meeting the judge or referee shall preside; but action upon the petition for adjudication shall not be delayed, except that the court, for good cause shown, may in its discretion delay such action upon such terms and conditions for the protection of and indemnity against loss by the bankrupt estate as may be proper.

"(b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

"(c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

"(d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors;

(2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

"(e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." (U. S. Code, Title 11, § 30).

"CHAPTER 5.—OFFICERS, THEIR DUTIES AND COMPENSATION."

"Section 33. **Creation of Two Offices.** The offices of referee and trustee are hereby created." (U. S. C., Title 11, § 61).

"Sec. 40. **Compensation of referees.**—(a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

(b) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

(c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee." (U. S. Code, title 11, § 68).

"Sec. 72. **Compensation restricted.**—Neither the referee, receiver, marshal, or trustee shall in any form or

guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act." (U. S. Code, Title 11, § 112).

§ 3 of the Act of Congress of June 7, 1934.

"* * * The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein." (§ 3 of the Act of Congress of June 7, 1934, 48 Stat. at L. 923, included in 11 U. S. Code Anno. as § 76a).

Section 77B—**Corporate Reorganizations.**

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him * * * (11) may refer any matters to a special master, who may be one of the referees in bankruptcy, for consideration and report, either generally or upon specified issues, and allow such master a reasonable compensation and reimbursement for his services and actual and necessary expenses. * * *"

"(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a

Federal or State or Territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8), of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under this section, and for the payment of administrative expenses and allowances in the proceeding hereunder. For the purposes of this section the words 'Federal court' shall include the district courts of the United States and of the Territories and possessions to which this amendatory Act is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska, and the District Court of the United States for the Territory of Hawaii." [U. S. Code, Title 11, § 207 (i)].

"(k) If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 22, who shall be compensated as provided in section 40; (2) the first meeting of creditors shall be held as provided in section 55, upon notice as provided in section 58; (3) a trustee or trustees shall be appointed as provided in section 44, and be compensated as provided in section 48; (4) claims which are provable under section 63 may be proved as provided in section 57, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 64; (6) sales shall be made as provided in subdivision (b) of section 70; (7) dividends may be declared and paid as provided in section 65. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 57, and subdivisions (a) and (e) of section 70, shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to

liquidate the estate. All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors.' 'Bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication." [U. S. Code, Title 11 § 207